UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

EMHART INDUSTRIES, INC.	:	
	:	
v.	:	C.A. No. 06-00218 WES
	:	
NEW ENGLAND CONTAINER COMPANY, INC., et al.	:	
	:	
EMHART INDUSTRIES, INC.	:	
	:	
v.	:	C.A. No. 11-00023 WES
	:	
UNITED STATES DEPARTMENT OF THE AIR FORCE, et al.	:	

REPORT AND RECOMMENDATION (SEALED)

Lincoln D. Almond, United States Magistrate Judge

These related environmental actions arise out of environmental contamination at the Centredale Manor Superfund Site (the "Site") located in North Providence, Rhode Island. The background and procedural history of these matters are well known to the parties and the Court, and thus need not be repeated here. Pending before me on referral for preliminary review, findings, and recommended disposition are cross-Motions for Summary Judgment filed in both actions by fourth-party Plaintiff BASF Corporation ("BASF") and fourth-party Defendant Rohm and Haas Company ("R&H"). 28 U.S.C. § 636(b)(1)(B) and LR Cv 72(a). These Motions are directed at Count I (contractual indemnification), the only remaining claim in BASF's fourth-party Complaint against R&H. The cross-Motions are docketed as ECF Nos. 1023 and 1025 in C.A. No. 06-00218 and ECF Nos. 845 and 847 in C.A. No. 11-

00023. The Motions and supporting pleadings are all filed under seal pursuant to prior Order of the Court. A sealed hearing was held on December 14, 2021. For the reasons discussed below, I recommend that BASF's Motions be GRANTED and R&H's Motions be DENIED.

Discussion

These Motions involve a fourth-party dispute regarding contractual indemnity for third-party environmental claims brought by Emhart against BASF. Emhart sues BASF as the alleged successor to Paragon Chemicals, Inc. ("Paragon") which formerly operated in Lincoln, Rhode Island. Paragon allegedly sent barrels to New England Container Company for reconditioning that contained hazardous substances found at the Site. Emhart alleges that a chain of corporate transactions and mergers, including R&H's 1986 sale of Furane Products Company ("Furane") to Ciba-Geigy Corporation ("Ciba-Geigy"), resulted in BASF succeeding to Paragon's environmental liability. (See BASF Exh. G). BASF disputes Emhart's third-party successorship claim but also brings the instant fourth-party action against R&H alleging that it is entitled to contractual indemnification from R&H under the 1986 Stock Purchase Agreement ("SPA") for Emhart's claim. BASF alleges that it is entitled to the benefit of that contractual indemnity as the successor to Ciba Specialty Chemicals Corporation ("Ciba Specialty").

Because of the passage of time, there is a limited universe of documents before the Court upon which to resolve these Motions, and the parties have entered into a stipulation as to those documents. (R&H Exh. K). They have also stipulated to the absence of live testimony in these proceedings from any percipient witness to facts relevant to these fourth-

party claims and defenses. Id. The well-established framework for deciding summary judgment motions under Rule 56 is applicable and set forth below.

A. Summary Judgment Standard

A party shall be entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When deciding a motion for summary judgment, the Court must review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. Cadle Co. v. Hayes, 116 F.3d 957, 959 (1st Cir. 1997).

Summary judgment involves shifting burdens between the moving and the nonmoving parties. Initially, the burden requires the moving party to aver "an absence of evidence to support the nonmoving party's case." Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). Once the moving party meets this burden, the burden falls upon the nonmoving party, who must oppose the motion by presenting facts that show a genuine "trialworthy issue remains." Cadle, 116 F.3d at 960 (citing Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995); Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994)). An issue of fact is genuine if it "may reasonably be resolved in favor of either party." Id. (Citing Maldonado-Denis, 23 F.3d at 581).

To oppose the motion successfully, the nonmoving party must present affirmative evidence to rebut the motion. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-257 (1986). "Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, [or] unsupported speculation." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). Moreover, the "evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve." Id. (quoting Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989)). Therefore, to defeat a properly-supported motion for summary judgment, the nonmoving party must establish a trialworthy issue by presenting "enough competent evidence to enable a finding favorable to the nonmoving party." Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993) (citing Anderson, 477 U.S. at 249).

Cross-motions for summary judgment "simply require [the court] to determine whether either of the parties deserves judgment as a matter of law on the facts that are not disputed." Barnes v. Fleet Nat'l Bank, N.A., 370 F.3d 164, 170 (1st Cir. 2004) (internal quotation marks and citation omitted). The legal standard for summary judgment is not changed when parties file cross-motions for summary judgment. Adria Int'l Group, Inc. v. Ferre Dev. Inc., 241 F.3d 103, 107 (1st Cir. 2001). "The court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a

judgment may be entered in accordance with the Rule 56 standard." Bienkowski v. Northeastern Univ., 285 F.3d 138, 140 (1st Cir. 2002) (internal quotation marks and citation omitted).

B. Has BASF Shown That it has Contractual Indemnity Rights under the 1986 SPA?

The short answer is yes. After thoroughly reviewing the parties' submissions, I find that there are no genuine issues of material fact on this record precluding the entry of summary judgment. More to the point, I also find that no reasonable fact finder could review the totality of this record and conclude that BASF has not met its burden by a preponderance of the evidence. The path is long and complicated but is undisputed in any material respect. While the journey is not crystal clear, BASF reasonably connects the dots sufficient to meet the preponderance standard of proof. Also, this conclusion reasonably prevents R&H from retaining the benefits of the 1986 SPA without the corresponding burden of indemnification for pre-closing liabilities. My reasoning follows.

The path starts with the 1986 SPA pursuant to which Ciba-Geigy purchased the shares of Furane from R&H. As noted previously, this dispute arises out of Emhart's claim that Furane is a successor to the environmental liabilities of Paragon. The 1986 SPA in Section 14.2 contains a standard indemnification provision in favor of the purchaser Ciba-Geigy and Furane for pre-closing environmental liabilities. BASF has shown that it ultimately succeeded to that entitlement to contractual indemnity.

Following its 1986 acquisition of Furane from R&H, Ciba-Geigy issued a press release in early 1987 indicating that Furane would operate as a unit of its "Electronic Chemicals Group" within its "Plastics and Additives Division." (BASF Exh. U). It further provided that the Furane acquisition included operations in Los Angeles "as well as Isochem operations in Lincoln, Rhode Island." Id. It also identified Furane as the developer and producer of certain products including "Epocast." Id. In 1988, Ciba-Geigy merged Furane into itself. (BASF Exh. V).

The next segment of the path forks at the 1996 Separation Agreement, and I find that BASF supports its position as to the fork taken by the 1986 SPA including R&H's continuing indemnification obligation. I reach this conclusion despite R&H's argument that things are not as clear as BASF claims following the 1996 Separation Agreement. The 1996 Separation Agreement is between Ciba-Geigy (now including Furane pursuant to the 1988 merger) and Ciba Specialty, a newly formed entity. (BASF Exh. Y). BASF describes it as basically a split of Ciba-Geigy's biological and nonbiological businesses. The nonbiological or specialty chemicals part of the business was defined as the "SC Business" and included the Additives Division (which included Furane pursuant to the 1987 press release). Id. That part of the business became Ciba Specialty. The biological business was separated out and renamed Novartis.[1] BASF's position is reasonably supported by the terms of the Separation Agreement. For instance, Schedule 1.01(d) identifies the Furane operations in Los Angeles as part of the SC Real Property

[1] By letter dated November 5, 2018, Novartis informs R&H that the indemnification rights in issue reside with BASF (as successor to Ciba Specialty), and not it, after the 1986 Separation Agreement. (BASF Exh. NN).

("SC") going to Ciba Specialty. (ECF No. 846-6 at p. 51). It is also undisputed that Furane was only operating in Los Angeles at the time. (BASF Exhs. W and X). The Separation Agreement also provides for the transfer of the SC Assets including SC Contracts to Ciba Specialty. (ECF No. 846-6 at pp. 16-17, and 20). The only reasonable conclusion to reach based on this record is that the 1986 SPA and its indemnification provision was included as an SC Contract and succeeded to Ciba Specialty.

BASF also reasonably shows that its interpretation of the 1996 Separation Agreement is borne out by proof that Ciba Specialty continued the Furane product line thereafter. For instance, in its disclosures for the 1986 sale of Furane, R&H identified Epocast as a trademarked Furane product. (ECF No. 846-5 at pp. 12-13). Further, a Material Safety Data Sheet identifies Epocast as a product manufactured by Ciba Specialty formerly Furane. (BASF Exh. AA). BASF also points to evidence that the Epocast trademark was transferred to Ciba Specialty in 1997. (ECF No. 869 at pp. 15-20).

The path takes a turn in 1999 when Ciba Specialty entered into a Transaction Agreement with Avanti for the sale of certain assets. (BASF Exh. BB). BASF asserts that this Agreement provided for Ciba Specialty to sell its Performance Polymers Business to Avanti, which included the Furane product line and the Los Angeles facility. (ECF Nos. 846 at ¶¶ 65 and 869 at p. 14). Also, BASF asserts in a demonstrative flow chart that the sale included the Furane product line, but Ciba Specialty "retained

liabilities associated with Furane." (BASF Exh. NN). The problem is that BASF cites only generally to the lengthy and vague Transaction Agreement for its factual assertions, and it offers no specific citation to provisions in the Agreement or quotations of the Agreement's terms to support its assertions. I have independently reviewed the Agreement and cannot specifically identify such support. Thus, the question is whether that factual link in the chain is material to determination of the successorship issue before the Court, and I conclude that it is not.

R&H naturally seizes upon this claimed failure of proof. It argues reasonably that "[t]here is no evidence in the record regarding what specific assets Ciba Specialty [ ] sold, as the lone document…is an umbrella agreement requiring various sub-agreements between different subsidiaries." (ECF No. 847 at p. 31). R&H accurately points out that none of these sub-agreements are in the record and that there is nothing in the Avanti Transaction Agreement that talks about Ciba Specialty, Furane or its products, or the contract in issue. BASF includes the Avanti transaction to provide a complete picture of the chain of corporate transactions (BASF Exh. NN and ECF No. 869 at p. 14) but contends that although some unspecified assets including the Furane product line went to Avanti, Ciba Specialty thereafter remained the successor to Furane entitled to indemnification by R&H. I agree with BASF. Back in the 1986 SPA, R&H sold Furane to Ciba-Geigy and expressly agreed as part of that sale to indemnify and hold those entities harmless for various pre-closing claims and liabilities including environmental matters. BASF has shown that R&H's 1986 indemnification obligation

succeeded to Ciba Specialty, and there is nothing in the Avanti transaction from which a reasonable fact finder could infer that R&H's contractual obligation to Ciba Specialty was transferred to Avanti.

BASF completes the chain by showing that Ciba Specialty changed its name to CIBA Corporation in 2007. (BASF Exh. DD). In 2009, BASF acquired the stock of CIBA Corporation. (BASF Exh. EE). In 2010, CIBA Corporation was converted to an LLC called BASF Performance Products. (BASF Exh. FF). Finally, in 2011, that LLC was merged into BASF Corporation. (BASF Exh. GG). Based on the above, I find that the totality of the undisputed evidence meets BASF's burden and proves by a preponderance that BASF is the successor to Ciba Specialty, and thus Ciba-Geigy's and Furane's rights under the 1986 SPA, including the right to contractual indemnity, currently reside with BASF.

C. Does the 1986 SPA Require R&H to Indemnify BASF with respect to Emhart's Third-party Claim concerning Paragon Chemicals?

The short answer is yes. BASF persuasively argues that Emhart's third-party claim against it falls squarely within the indemnification provision of the 1986 SPA. As previously noted, Emhart alleges BASF is the successor to Paragon and that BASF is connected to Paragon through Furane. While BASF denies Emhart's claim and disputes that Furane is the successor to Paragon, the indemnification provision is triggered by Emhart's assertion of a "claim" that allegedly arises out of Furane. R&H disputes BASF's reading of the indemnification provision and asserts that Section 14.2(i) of the 1986 SPA unambiguously requires BASF to "demonstrate" that Paragon is a predecessor

of Furane. (ECF No. 847 at p. 50). It asserts that "BASF cannot hide behind Emhart's allegations to satisfy its burden." (Id. at p. 52). In other words, R&H contends that BASF must prove Emhart's successorship theory of liability in order to trigger indemnity. BASF reasonably describes R&H's position as nonsensical.

The parties agree that Delaware law applies to this dispute, and there is no real dispute as to the applicable legal principles. Rather, the parties present competing interpretations of the indemnification language in question, a pure question of law. Applying the applicable rules of contract interpretation, I have analyzed and interpreted the language of the indemnification provision to identify its plain meaning. After doing so, I find that the clear and unambiguous contract language supports BASF's position.

Section 14.2 of the 1986 SPA provides, in relevant part, as follows:

> **Indemnification by Rohm and Haas and RH Del.** Rohm and Haas and RH Del, jointly and severally, shall indemnify and hold harmless CIBA-GEIGY and Furane, and shall reimburse CIBA-GEIGY and Furane for, any loss, liability, claim, damage, expense (including, but not limited to, costs of defense and reasonable attorneys' fees) (collectively, "Damages") arising from or in connection with:
>
> …
>
> (i) any claim against Furane or any of its property relating to public or worker health, welfare, safety or the environment which arises on account of any act or omission of Furane (or any predecessor entity), or the operation of the business of Furane (or any predecessor entity), or the operation of any properties currently owned by Furane, prior to the Closing Date, or any matters pertaining to the operation or ownership of any properties previously owned or operated by Furane (or any predecessor entity); provided, that, as to environmental matters, this subsection (i) shall cover only third party claims, actions demanded or initiated by any Governmental Body or

> otherwise required by law, and actions to which any Governmental Body is a party;

BASF has shown that Emhart's claim against it meets the clear and unambiguous requirements for indemnification pursuant to Section 14.2. Emhart brings a third-party "claim" against BASF alleging responsibility for the environmental liabilities of Paragon, an alleged predecessor of Furane. It is undisputed that the liability claim predates the 1986 SPA. Section 14.2(i) plainly applies since Emhart's "claim" is a "third party claim[ ]" "against Furane," "relating to…the environment," arising "on account of…the operation of the business of Furane (or any predecessor entity)," and occurring "prior to the Closing Date." The triggering event is the assertion of a covered "claim." It does not require that the claim have merit or be litigated to a judgment before indemnification is required. If so, R&H's interpretation would render meaningless the requirements of Section 14.4 which give the indemnifying party entitlement to notice of a covered "claim" and the option to assume its defense.

R&H seeks to take a narrow view of the meaning of a "claim" and argues that it only applies to claims against undisputed, and not alleged, predecessors of Furane. It accuses BASF of seeking to read the term "alleged" into the parenthetical referencing a predecessor entity to Furane. However, the plain language and intent of Section 14.2 suggests otherwise. BASF is not being sued for any direct connection to Paragon. Rather, it is being sued as succeeding to Furane's liabilities, as the successor to Paragon. The purpose of Section 14.2, in part, is to indemnify the buyer of Furane for pre-Closing

claims. BASF now stands in the shoes of that buyer and faces a successor liability claim directed at Furane. It is plainly a covered claim.

R&H unpersuasively points to the use of the term "alleged" in Section 14.2(b) to support its reading. However, that provision narrowly deals with potential claims for brokerage/finder's fees or commissions contemporaneously related to the 1986 sale itself. It understandably uses the term "alleged" because any actual agreements and understandings in that regard would have been disclosed and dealt with at the time of Closing, and there would only be a need to provide indemnification after the Closing for "alleged" entitlements to unpaid brokerage fees or commissions. On the other hand, Section 14.2(i) deals more broadly with a range of potential post-Closing claims including environmental claims which are often, as here, pursued on successor liability theories. The single use of the term "alleged" in Section 14.2(b) does not have the broad implications suggested by R&H.

Finally, the parties dispute the applicability and meaning of Section 14.2(a) which provides for indemnification for expenses including reasonable attorneys' fees "for any failure by [R&H]…to perform or comply with any agreement in this Agreement." BASF argues that R&H's failure to honor its indemnification obligation to BASF is such a "failure to perform or comply" and gives it a claim for its reasonable attorneys' fees and expenses incurred in prosecuting this fourth-party claim. I am compelled to agree with BASF given the plain language of Section 14.2(a). R&H's reliance on Section 14.4 is not persuasive. R&H argues that Section 14.4 gives it the option to defend or deny the

tender of a claim. R&H takes too narrow a reading and puts the cart before the horse. If R&H accepts the tender, it then has the option under Section 14.4 of directly defending the claim or stepping aside and accepting liability for defense costs. BASF has shown that Section 14.2(a) applies because R&H's denial of BASF's tender of the Paragon claim was a "failure to perform or comply" with the indemnification provision of the 1986 SPA.

Conclusion

For the foregoing reasons, I recommend that BASF's Motions as to Count I be GRANTED and R&H's Motions be DENIED. Also, since this Report and Recommendation references both arguments and facts in pleadings previously sealed by the Court and quotes from contracts subject to a confidentiality protective order, the Clerk shall docket this Report and Recommendation under seal until further Order of the Court.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within fourteen days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
December 28, 2021